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IN THE

Supreme Court of the United States

October Term, 1958

No. 913

JOSEPH L. SCLAFANI,

Petitioner,

AGAINST

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 30, 1959.

Citation of Opinions

The opinion of the Court of Appeals, printed in Appendix B hereto, *infra*, page 19 to page 35, is unreported. The opinion of District Judge Rayfiel denying motions made by petitioner before trial is reported at 126 F. Supp. 654, and is printed in Appendix B hereto, *infra*, page 36 to page 39.

Jurisdiction

The judgment of the Court of Appeals with respect to which the Writ of Certiorari is sought was entered on March 30, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

1. Was not Petitioner rendered immune from prosecution for the crimes charged in the Information because he was compelled to testify before a Grand Jury, in violation of the Due Process Clause of the Fifth Amendment, after the Information was filed?

a. Was not such compelled testimony an unpermissible Examination Before Trial in a criminal action and an abuse of the Grand Jury Process?

b. Did not such compelled testimony both as to personal and corporate records infringe Petitioner's privilege under the Fifth Amendment not to incriminate himself?

2. Were not the statements, admissions and documents obtained from Petitioner by Stealth and Deceit, by Revenue Agents, in violation of the Fourth and Fifth Amendments, after a routine civil audit of a corporate return for the year 1947 had been referred to the Tax Fraud Division of the Internal Revenue Service for investigation of criminal charges against Petitioner personally for the years 1945 to 1949?

3. Should not Counts IV and V of the Information have been dismissed because they were barred by the Statute of Limitations; on their proper dismissal should not respondent's entire case have fallen?

4. Did not the error of the Trial Court and the Court on Application before Trial in failing to grant Petitioner a Bill of Particulars deprive him of a fair trial?

Constitutional Provisions and Statutes Involved

The pertinent Constitutional and Statutory provisions are printed in Appendix A, *infra*, pages 17 to 18.

Statement

Petitioner was convicted after a jury trial before James T. Foley, J., on April 12, 1956 in the District Court for the Eastern District of New York on seven of eight Counts of Information charging violations of Section 145 (b) of the Internal Revenue Code of 1939.[1] The second Count was dismissed by the Court during trial. He was sentenced to a term of 15 months in jail on each of the counts, to run concurrently, and to pay a fine of $5,000.00 each on counts I and VI.

Counts I, II and III of the Information charged Petitioner as president of Joseph L. Sclafani, Inc. with attempting to evade taxes due by the corporation for 1947, 1948 and 1949 by filing false corporate returns.

Counts VI, VII and VIII charged him with evading personal income taxes owing by himself and his wife for 1947, 1948 and 1949 by filing false returns.

Counts IV and V charged him with attempting to evade income taxes due from him and his wife for 1945 and 1946 by making and filing false and fraudulent statements with the Treasury Department between June 21, 1950 and January 12, 1951.[2]

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1. Appendix A, *infra*, pp. 17-18.

2. The Information was filed February 25, 1954. Petitioner's returns for 1945 and 1946 were filed in March, 1946 and 1947 respectively.

Respondent's theory as to the entire case was "that this was a net worth case" (R. 40) and the Court so charged (R. 2695).

The Grand Jury Proceedings:

After the information was filed and before trial, respondent served two subpoenas returnable July 27, 1954, on Petitioner, requiring his oral testimony, and to produce the books and records of Joseph L. Sclafani, Inc., a corporation. Petitioner appeared before the Grand Jury and upon his refusal to testify on constitutional grounds, was thereupon brought before District Judge Bruchhausen (R. 2024). Petitioner was ordered by the Court to testify before the Grand Jury and testified on July 28, 29 and 30, 1954.

Petitioner subsequently moved to dismiss the Information on the ground that he had been rendered immune from prosecution by reason of compulsory testimony respecting the subject matter of the Information (R. 2840). The motion was denied by District Judge Rayfiel (R. 2871). Judge Rayfiel's opinion is printed in Appendix B, *infra*, pages 36 to 39.

No information or indictment was ever filed against Joseph L. Sclafani, Inc., before or subsequent to the Grand Jury Proceedings. The sole purpose was to enable the respondent to prepare for the criminal trial of Petitioner.

The Illegal Search and Seizure:

The case against Petitioner had its inception when, on May 26, 1950 Agent Sonkin, of the Internal Revenue Service, whose duties were "to go out and make audits of returns assigned for investigation" (R. 111), visited the offices of Joseph L. Sclafani, Inc., to make a "routine

audit" of the corporation's 1947 income tax return (R. 110). He discussed this with Petitioner and received his permission to examine the relevant corporate books. He examined these books on May 26, 1950 and again on June 16, 1950. He again saw Petitioner on this date and discussed only corporate matters (R. 147).

On returning to his office on June 16, 1950, Sonkin testified that, after conferring with his superior and telling him that there might be fraud in this case, he telephoned Petitioner on that date, and asked him to submit a personal net worth statement for the years 1945 to 1949 (R. 158). He did not advise Petitioner of his constitutional rights, or that his statement might incriminate him, or that the status of the case had changed from a civil routine audit of the corporation for the year 1947 to a possible criminal fraud action against Petitioner for the years 1945 to 1949.

Petitioner immediately mailed to Internal Revenue a Net Worth statement for the years 1945 to 1949 (Ex. 22), received by Internal Revenue on June 22, 1950 (R. 149).

Nothing occurred thereafter until August 18, 1950, when Sonkin telephoned Petitioner and made an appointment to see him. By prearrangement he took Special Agent Silbert of the Tax Frauds Section of the Intelligence Division with him (R. 1198, 1209). Silbert introduced himself as "Special Agent" (R. 1209; 1570), "When I introduce myself I normally identify myself. I don't recall what was done on that occasion". Neither informed petitioner of the changed status of the matter.

Silbert in a lengthy conference with Petitioner questioned him as to Exhibit 22 and at the end thereof asked him to submit a new Net Worth statement to him. On that date Petitioner gave to Silbert retained copies of his personal income tax returns for the years 1934 to 1944 (Ex. 328) and sent the new Net Worth statement (Ex. 22A) to him on August 20, 1950.

Petitioner testified (R. 1208) that when Sonkin telephoned him on June 16, 1950 he told him that he needed the net worth statement "to close up the case".

The Statute of Limitations:

Counts IV and V charged Petitioner with knowingly attempting to evade and defeat taxes due and owing to the Government for the years 1945 and 1946. Petitioner's income tax returns for those years were filed in March 1946 (Ex. 1) and March 1947 (Ex. 2). The period of limitation as set forth in Section 3748 (26 U. S. C.) Appendix 9, *infra*, page 18 is six years.

Although these Counts seek to charge Petitioner with attempting to evade his income tax for the years 1945 and 1946, they are predicated on the allegedly false statements made to Internal Revenue Agents in 1950 and 1951.

Denial of Bill of Particulars:

Petitioner moved before Trial and at the opening of the Trial for a Bill of Particulars. Both motions were denied (R. 15, 2828).

In the first four trial days, Respondent introduced 150 exhibits in evidence, the great bulk of which had never been seen by Petitioner, and none of which had ever been seen or made available to his attorneys. Exhibits, bulky and complicated, some of them comprising many pages of accounting matters, including one Exhibit No. 141 (particularly damaging to the defense because of the improper remarks of the Prosecutor, were flashed in front of Petitioner and his attorneys, admitted over objection, and taken away). Counsel for the defense attempted to get these exhibits at the end of the Court day, have them photostated and returned to Respondent. As stated to the Court at that time counsel could not properly examine the

Exhibits when the witnesses were testifying. They had attempted to photostat the documents at the end of the court day at their own expense. The photostats would be returned commingled and blurred and it was impossible for counsel to put them together to make any sense whatsoever. The result was that hours were spent in this attempt and at the end counsel were more confused than when they started out (R. 507, l. 17 to R. 517, l. 2).

The Court attempted to have Respondent let Petitioner's counsel examine these exhibits in the morning prior to the opening of Court, but despite Respondent's reluctant acquiescence and the cooperation of defense counsel throughout the trial, the important Exhibits were unavailable. The procedure heretofore outlined continued until the end of the trial. The Prosecution presented 398 Exhibits, an average of one Exhibit every fifteen minutes. Many of the Prosecution Exhibits were intricate accounting documents which contradicted each other. Their factual basis could never be ascertained in order to cross-examine the witnesses properly as to their accuracy. The Exhibits covered transactions of Petitioner, his father-in-law, mother-in-law, sister-in-law, brothers-in-law, corporations in which Petitioner was interested, transactions of his father, mother, his uncle, his aunts, his brothers and inter-family transactions. Thousands of entries covering transactions over a period of thirty years.

Reasons for Allowance of the Writ

1. Abuse of the Grand Jury Process:

Petitioner moved before Trial (R. 2840) during the Trial (R. 2024) and contended in the Court below that the Information should have been dismissed because respondent abused the Grand Jury Process by utilizing the Grand

Jury as a means of obtaining an Examination Before Trial of Petitioner in a criminal case after the Information had been filed.[3] The Court below held:

> "Even if we were now to assume both that the government proceeded before the Grand Jury, as Sclafani alleges, in order to prepare for trial of the case against him, and that such use of the Grand Jury was inconsistent with the guarantees implicit in the Federal Rules of Criminal Procedure or the Fifth Amendment, our result would be the same, since no injury resulted from the alleged abuse."

Petitioner contends that the decisions of the Court below and the District Court are incorrect and that this Court should grant review. The Court below failed to cite any authority in its opinion in support of its ruling[4] and did not mention *Mulloney* v. *United States*, 79 F. 2d 566 (3 Cir. 1935) Cert. den. 296 U. S. 658, in which that Court at page 579 adopted the lower Court's charge to the Jury, which authority is contradicted by the decision rendered by the Circuit Court herein.

No information or indictment was ever filed against anyone subsequent to the Grand Jury proceedings. It is clear

3. The motions to dismiss the Information and to inspect the Grand Jury minutes were denied by Rayfiel, J. For convenience, his opinion reported in 126 F. Supp. 654 is printed in App. B. *Infra*, pages 36-39. Similar motions made during trial were likewise denied, but the Court marked Petitioner's Grand Jury testimony as Court Exhibit I for use by the Appellate Courts (R. 2043).

4. The Court below did cite *U. S.* v. *Lawn*, 115 F. Supp. 674 (S. D. N. Y., 1953), and *In re Fried*, 161 F. 2d 453 (2 Cir., 1947), stating that the instant case must be distinguished from those cases. Petitioner submits that Lawn cannot be distinguished. *In re Fried* did not involve a Grand Jury. The *Lawn* case cited in the opinion of the Court below involved a completely different question from that considered by this Court in 355 U. S. 301 involving the same defendant.

that the sole purpose of the Grand Jury proceedings was to enable Respondent to prepare for the trial of Petitioner in the Court below.

The scope of permissible inquiry by a Grand Jury is not without limit. The limit of its function is reached and exhausted when an indictment is returned; thereafter it has no further concern with or interest in the matter since the Grand Jury is not an instrumentality for examination before or preparation for trial. See *In re Oliver*, 333 U. S. 257, at 265 (1948); *In re National Window Glass Workers*, 287 Fed. 219; *Norcross* v. *United States*, 209 Fed. 13 (9th Cir.).

There is no such thing as examination before trial in a criminal case. Congress has not granted the prosecution the right in a criminal case to examine witnesses on compulsory process before trial:—a suggestion that the prosecution should be allowed to examine indicted defendants before trial was not even proposed. See Note, pages 100-101, Federal Rules of Criminal Procedure Preliminary Draft (1953). In *National Glass Workers, supra*, the Court said that the Grand Jury power "should not be used for the purpose of securing evidence against defendants under indictment in support of the indictments already found." And in *United States* v. *Remington*, 191 F. 2d 246, the Second Circuit said that if the prosecution should call witnesses in preparation for trial after an indictment had been returned, the conduct "could not be condoned" (at p. 251).

Even under the rules that permit identification by corporation officers of corporate documents, Petitioner's compulsory testimony before the Grand Jury under the guise of the corporate record doctrine in order to prepare a case involving him is an abuse of Grand Jury process.

During the course of the trial Respondent introduced Exhibits 366 and 367 in evidence (R. 1518). It appeared that these exhibits were part of a Grand Jury Exhibit No. 54 for identification (R. 1511). Petitioner claimed that these exhibits were personal records concerning which he was questioned before the Grand Jury and moved during the trial (R. 2024) to dismiss the Information on the ground that his constitutional rights were infringed upon by bringing him before the Grand Jury after the Information was filed and asked that there be made available to him the transcript of the Grand Jury proceedings. The motion was denied. The Court below held that Respondent

> "far from contending that these Exhibits were personal records of Sclafani completely ignored his contention and asserted that they were records of corporate transactions, offering them as a link in the chain of proof that Sclafani had diverted the repayment of certain corporate loans to himself." (Appendix B, *infra*, p. 34.)

Respondent at several times during the trial commented on the fact that Petitioner had claimed these records to be personal records and that this proved that the money he had obtained as represented by those records, were diversions from corporate funds. Thus, whether these records were corporate records as Respondent contended or personal records as Petitioner stated before the Grand Jury, such testimony elicited before the Grand Jury was testimony used against Petitioner at the trial, in violation of the Fifth Amendment.

The Fifth Amendment mandates a clear restraint on Government: "No person • • • shall be compelled in any criminal case to be a witness against himself". The price of infringement of this fundamental constitutional liberty

is immunity against prosecution for the subject matter of the crime concerning which the testimony is compelled.[5]

For the reasons advanced, it is immaterial whether Petitioner was subpoenaed before the Grand Jury as an individual or as an officer of the corporation. To the extent that he was compelled to testify and to identify personal documents, his constitutional rights were violated. To the extent that he was called in any capacity after the Information had been filed, there was an abuse of the Grand Jury process and the Information should have been dismissed.

2. Illegal Search and Seizure:

Petitioner submits that the statements, admissions and documents obtained from him by Agents Sonkin and Silbert should not have been admitted in evidence.

The Court below held that after Petitioner consented to a "routine audit" of a corporate tax return for the year 1947, it was not a violation of his rights under the Fourth Amendment to obtain statements, admissions and documents from him concerning his personal taxes for the years 1945 through 1949, when, without disclosing an altered purpose, the "civil" agent and his superiors brought in a "criminal" investigator. It said:

> "Several cases appear to have held that the failure to disclose that a once 'routine' tax investigation, for which consent was procured, has grown into one to discover whether a crime has been com-

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5. *Counselman* v. *Hitchcock*, 142 U. S. 547, at 564, 568; *U. S.* v. *Indolschek*, 142 F. 2d 503, (2d Cir., 1944); *Mulloney* v. *U. S.*, 79 Fed. 2d 566, Cert. den. 296 U. S. 658; *Hoffman* v. *U. S.*, 341 U. S. 479, 71 SC 814 at 485; *Nardone* v. *U. S.*, 308 U. S. 338; *U. S* v. *Coplon*, 185 F. 2d 629 (2d Cir., 1950); Cf. *Gouled* v. *U. S.*, 255 U. S. 298.

> mitted, renders the subsequent entries fraudulent and infects the accompanying search. See, e.g., Matter of Bodkin, 165 F. Supp. 25 (E. D. N. Y. 1958); United States v. Lipschitz, 117 F. Supp. 466 (E. D. N. Y. 1954); United States v. Guerrina, 112 F. Sup. 528 (E. D. Pa. 1953); Cf. United States v. Wolrich, 129 F. Supp. 528 (S. D. N. Y. 1955). We think that the reliance of these cases on the rule of Gouled v. United States, 255 U. S. 298 (1921) is misplaced, and that in circumstances such as these the failure to disclose the changing course of the investigation is not fraudulent or deceitful. See Turner v. United States, 222 F. 2d 926 (4 Cir. 1955) and cases cited." (Appendix B, *infra*, p. 28.)

Petitioner submits that the Court below erred in disregarding the lower court decisions on this question cited in its opinion and also in misconstruing *Gouled* v. *United States*, 255 U. S. 298, where this Court said at page 305:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be; it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

"Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound * * *."

3. Statute of Limitations:

The Court below refused to pass on whether Counts IV and V were time-barred because it said the conviction and sentence are sustainable whether or not Counts IV and V were proper.

Petitioner contends that Counts IV and V of the Information should have been dismissed because they were barred by the Statute of Limitations.[6] Upon their proper dismissal the entire mass of evidence presented in connection with those Counts was incompetent and should have been excluded. Upon its exclusion, the whole case would have fallen.

Section 3748, 26 U. S. C., prescribing periods of limitation is set forth in full in Appendix A at page 18. This section provides a period of limitation of six years, for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof.

The Information in this case was filed more than six years after Petitioner's returns for 1945 and 1946 were filed.

Counts IV and V seek to charge Petitioner with attempting to evade his income taxes for the years 1945 and 1946. These counts however, charge Petitioner with attempting in 1950 and 1951 to evade taxes for 1945 and 1946 by making false statements to Internal Revenue Agents. This effort was apparently made on the basis of the indictment

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6. A motion to dismiss said Counts was made before trial. This motion was denied (R. 2854). The opinion of Rayfiel, J., is reported in 126 F. Supp. 654 and is printed in App. B. at pages 36-39.

which was before this Court in *United States* v. *Beacon Brass Co.*, 344 U. S. 43. However, in *Beacon Brass* this Court expressly deferred consideration of the applicability of the statute. In that connection the Court said:

> "Appellees contend that the acts charged constitute only one crime of tax evasion that was complete when the allegedly false return was filed. On this basis, appellees seek to sustain the decision below on ground that the six year Statute of Limitations had run and that the dismissal of the first indictment is res adjudicata and a bar to the second indictment for the same offense. We do not consider these questions because our jurisdiction on this appeal is limited to the District Court's construction of the Statute in light of the facts alleged in the indictment" (18 U. S. C. Sec. 3731).

Beacon Brass thus expressly left undecided the bar of the statute in this precise type of prosecution, although Black, J., noted his vote to sustain the defense. No Appellate Court has yet spoken on the question left open by this Court in *Beacon Brass.*

It is settled that the crime denounced by Section 145(b) is committed when the false return is filed. *Cf. Cave* v. *United States,* 159 F. 2d 464, 467 (8th Cir.); *Myres* v. *U. S.,* 174 F. 2d 329, 334 (8th Cir., 1949); *U. S.* v. *Croesant,* 178 F. 2d 96 (3rd Cir., 1949). In the instant case it is obvious that the charge is actually that Petitioner filed false tax returns for the years 1945-1946. This necessarily follows because if the returns for 1945 and 1946 were correct then no false statements in 1950-1951 could constitute an attempt to evade the taxes for those years. Further, under Counts IV and V the Respondent must prove that the returns for 1945 and 1946 were false and that a tax is owing for those years. Thus, the crux of the charge

is the failure to report income for 1945 and 1946, which acts, if they took place, occurred when the returns for 1945 and 1946 were filed, more than six years prior to the finding of this information. The six years having run, prosecution is barred by the statute of limitations.

In this connection it must be emphasized that the Respondent used exactly the same evidence in its attempt to prove the 1945 and 1946 counts, i.e., the falsity of the returns as it did in its attempt to prove the 1947-8-9 returns, and was not concerned with the falsity of the statements as such. What Respondent thus did was to prosecute for an offense barred by the Statute.

4. Denial of Bill of Particulars:

Motions were made by Petitioner before the trial and at the opening of the trial for a Bill of Particulars. Both motion were denied (*Supra*, p. 6). The Court below held that the claim that these denials were erroneous and prejudicial is without support in the record and states that Petitioner's failure to move for a continuance of the ground of surprise is an affirmative indication that they were not prejudicial. Petitioner contends that the record (pp. 507 to 517) is conclusive as to prejudice and that without the Bill of Particulars it was impossible for him to know what he would have to defend himself against or how he could defend himself. He could never have prepared and was not prepared to answer adequately any of the prosecution charges and neither Petitioner, the Court, nor the jury could determine what theory, what amounts, what years, or what charges Respondent was applying to him.

The holding of the Court below in the instant case is in direct conflict with its decision in *U. S.* v. *O'Connor*, 237 F. 2d 466, which Petitioner contends is on all fours with the case at bar. The decision below is also in direct con-

flict with *Bowman Dairy Co.* v. *U. S.* (1951), 341 U. S. 214, 71 S. Ct. 675, 95 L. Ed. 879, *Fryer* v. *U. S.* (1953) U. S. App. D. C. 34, 207 F. 2 134, Cert. Den. 346 U. S. 885, 74 S. Ct. 135, 98 L. Ed. 389, *Singer* v. *U. S.*, 58 F. (2) 74 (C. C. A. 3rd). In this case the denial of the Bill of Particulars eliminated completely any possibility of a fair trial to Petitioner. The denial, moreover, is amazing, to say the least, in that, in a criminal trial involving the very liberty of Petitioner, the Respondent could examine him before trial by subpoenaing him before the Grand Jury and compelling him to testify against himself and yet in the very same trial, deny him the right to have any information or particulars as to the case against him.

CONCLUSION

For the reasons set forth above this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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